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In the Supreme Court of the United States

OCTOBER TERM, 1995

NORTHERN STATES POWER COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
BRUCE R. ELLISEN
CHARLES BRICKEN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the amount of interest to be paid on petitioners' income tax refunds in this suit involving several taxable years should be calculated by "netting" petitioners' underpayments of income tax for 1980, 1983, and 1984 against their overpayments of income tax for 1981 and 1982, even though the underpayments had been paid in full and thus did not exist at the time the overpayments were determined.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 73 F.3d 764. The opinion of the district court (Pet. App. 15-21) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1996. A petition for rehearing with suggestion for rehearing en banc was denied on April 5, 1996 (Pet. App. 23). The petition for a writ of certiorari was filed on July 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1990, the Internal Revenue Service disallowed various deductions claimed by petitioners on their income tax returns for 1980, 1981, 1983, and 1984. The IRS assessed tax deficiencies against petitioners for those years. Petitioners paid the deficiencies which, together with interest, aggregated $23,630,893. Petitioners then filed administrative claims for refund for those years and also filed amended returns for certain years (1981, 1982, and 1984), asserting an entitlement to additional refunds for previously unclaimed tax credits. When these administrative refund claims were not granted, petitioners commenced this refund suit in district court (Pet. App. 2).

In 1994, the parties settled the disputed substantive tax issues and stipulated that petitioners' income tax liabilities for 1980, 1983, and 1984 were greater than the amounts that they had reported and that their liabilities for the years 1981 and 1982 were less than reported. Because the agreed deficiencies for 1980, 1983, and 1984 were smaller than the deficiencies originally determined by the IRS (which petitioners had paid in 1990), the parties agreed that petitioners had overpaid their tax for those years and were entitled to refunds of tax plus interest for each of those years. The parties were unable, however, to agree on the correct manner of calculating the interest payable on the refunds. That calculation had financial importance because, after January 1, 1987, underpayments of tax bear interest at a higher rate than overpayments (Pet. App. 2-3). See 26 U.S.C. 6601(a), 6611(a), 6621(a).

Petitioners took the position that they were entitled to credit or "net" their overpayments for 1981 and 1982 against their underpayments for 1980, 1983, and 1984 as of the dates the underpayments arose. Since the total amount of the overpayments for 1981 and 1982 exceeded the total amount of the underpayments for the other three years, petitioners contended that no interest should accrue on the underpayments at the higher underpayment rate. The government disagreed with petitioners' proposed method of netting underpayments and overpayments, contending that the interest due on overpayments—and owed on underpayments—should be calculated separately for each taxable year in issue (Pet. App. 3-4). As of November 30, 1994, the amount of interest due to petitioners under their method of calculation was approximately $460,000 more than the amount calculated under the government's method (Pet. App. 3 n.3).

2. The district court ruled in petitioners' favor (Pet. App. 15-21). The court concluded that the legislative history of Section 1511(b) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2744, indicates that the government is to "net" overpayments and underpayments in the manner that petitioners sought (Pet. App. 19). The court held that petitioners are "entitled to have the interest on [their] tax refunds for 1980 through 1984 computed by netting the 1981 and '82 overpayments against the '80, '83, and '84 underpayments" (Pet. App. 20) and entered judgment accordingly (Pet. App. 22, 24-25).

3. The court of appeals reversed (Pet. App. 1-14). Focussing on the language of the governing statutes, the court held that the amount of interest to be paid on petitioners' income tax refunds for the tax years

1980 through 1984 should not be calculated by "netting" the overpayments of tax against underpayments that did not exist (because they had previously been paid) at the time the overpayments arose. The court concluded that the text of the applicable statutes disposes of this case (Pet. App. 5-7, 11) for, (i) as a general rule, interest is calculated separately on overpayments and underpayments of tax (26 U.S.C. 6601(a), 6611(a), (b)) and, (ii) as an exception to that general rule, an underpayment is to be "netted" against an overpayment in calculating the amount of interest due only when the underpayment is satisfied by a "credit" of the overpayment (26 U.S.C 6601(f)). The court noted that the IRS has discretionary authority to refund a tax overpayment or instead to credit it against a tax liability (26 U.S.C. 6402(a)) and that a tax overpayment can be credited against a tax liability only when that liability is unpaid and outstanding at the time the credit is to be made (Pet. App. 7-8). Because the underpayments involved in this case were fully paid in 1990—and therefore did not exist in 1994 when the existence of the overpayments was determined—the IRS never credited (and, indeed, could not possibly have credited) petitioners' overpayments against their underpayments. As the result, the netting rules of Section 6601(f) of the Code were not applicable, or available, in this case (Pet. App. 11):

> [T]he IRS may credit an overpayment against an outstanding liability, and, if it does, Section 6601(f)'s netting provision comes into play. In this case, however, not only has the IRS apparently chosen not to credit the overpayments, there were

no outstanding liabilities against which the overpayments might be credited.

The court rejected petitioners' reliance upon the decision of the Seventh Circuit in *Pettibone Corp.* v. *United States*, 34 F.3d 536 (1994). The court explained that the decision in *Pettibone* "has little to do with this case" (Pet. App. 13) because, unlike the situation here, "netting" occurred in *Pettibone* when unpaid, outstanding tax deficiencies were satisfied by crediting overpayments against them (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. In general, the taxpayer must pay interest on the amount of any underpayment from the date prescribed for payment until the date the tax is paid. 26 U.S.C. 6601(a). When an overpayment occurs, the government is also to pay interest on the amount overpaid from the date of the overpayment. 26 U.S.C. 6611(a). The IRS is permitted, in its discretion, to credit the amount of an overpayment (including the interest allowed thereon) against any unpaid liability for an internal revenue tax of the person who made the overpayment. 26 U.S.C. 6402(a). When any part of a taxpayer's liability is satisfied by the credit of an overpayment, no interest is imposed on the portion of the underpayment thus satisfied for the period during which interest would have been allowable on the overpayment if the credit had not been made. 26 U.S.C. 6601(f), 6611(b)(1). Section 6601(f) of the Internal Revenue Code expressly provides (26 U.S.C. 6601(f) (emphasis added)):

> *If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed* under this section *on the portion of the tax so satisfied* for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment.

Prior to January 1, 1987, when interest accrued on underpayments and overpayments of tax at the same rate, it ordinarily made no difference whether an underpayment was satisfied by credit of an overpayment (with the result that no interest would be deemed to have accrued for the period during which both the underpayment and overpayment existed) or whether interest was permitted to accrue simultaneously on both. After January 1, 1987, however, the rate of interest that taxpayers must pay on *under*payments has been higher than the rate that the government is to pay on *over*payments. 26 U.S.C. 6621(a).[1]

b. Petitioners object to having the interest on their tax refunds calculated separately for each year in issue because, for any period after 1986 during which

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[1] In 1986, Congress amended Section 6621 of the Internal Revenue Code, 26 U.S.C. 6621, effective as of January 1, 1987, to provide that the rate of interest on underpayments, which previously had been the same as the rate on overpayments, would be one percentage point higher than the rate on overpayments. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1511(a), 100 Stat. 2744. Since that time, Congress has twice amended Section 6621 to increase the spread between the rates of the interest that accrues on certain overpayments and underpayments of corporations. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11341(a), 104 Stat. 1388-471 (adding I.R.C. 6621(c)); Uruguay Round Agreements Act, Pub. L. No. 103-465, § 713(a), 108 Stat. 5001.

they had both an underpayment of tax for one year and an overpayment of tax for a different year outstanding at the same time, that method would give the government the benefit of the statutory differential in interest rates on underpayments and overpayments. See note 1, *supra*. Petitioners seek to eliminate the effect of that statutory differential by crediting any overpayments of tax that they had outstanding for some years against any underpayments that, at the same time, they had outstanding for other years. Under petitioners' theory, interest would run in their favor whenever the aggregate of their overpayments exceeded the aggregate of their underpayments (a computational method referred to as "global netting").

In 1990, however, petitioners paid in full the underpayments that existed in their income taxes for 1980, 1983, and 1984. Because those underpayments had been paid in full, none of them were (or could have been) satisfied by the credit of overpayments determined *after* 1990 for different taxable years (Pet. App. 11). As the court of appeals correctly held (*ibid.*), because petitioners' underpayments were not "satisfied by credit of an overpayment" (26 U.S.C. 6601(f)), the netting provisions of Section 6601(f) are simply not applicable.

2. Petitioners ignore the plain language of Section 6601(f) which limits netting to the situation where an underpayment is "satisfied by credit of an overpayment" (26 U.S.C. 6601(f)). They assert (Pet. 13, 20-23) that a different conclusion is supported by the text and history of Section 1511 of the Tax Reform Act of 1986 (the 1986 Act), Pub. L. No. 99-514, 100 Stat. 2744, which established the interest rate differential in Section 6621 of the Code between interest on

underpayments and interest on overpayments. See note 1, *supra*. Petitioners contend that Section 1511(b) of the 1986 Act requires netting in all cases in which a taxpayer has an underpayment for some years and an overpayment for other years (Pet. 14, 23).

The text of Section 1511(b) of the 1986 Act plainly does not mandate netting of underpayments and overpayments in all circumstances. That Section provides only that the Secretary (100 Stat. 2744):

> may issue regulations to coordinate section 6621 of the Internal Revenue Code * * * with section 6601(f) of such Code. Such regulations shall not apply to any period after the date 3 years after the date of the enactment of this Act.

Obviously, a provision that does no more than authorize the adoption of temporary regulations—having an effective life no longer than 3 years—imposes no substantive requirement concerning the netting of overpayments and underpayments. As the court of appeals correctly concluded (Pet. App. 9 n.6), Section 1511(b) of the 1986 Act plainly does not impose a congressional mandate that the IRS employ global netting computations in the circumstances of this case. In particular, nothing in Section 1511(b) purports to alter the scope or operation of Section 6601(f) of the Code, which provides for netting in the calculation of interest only when an underpayment "is satisfied by credit of an overpayment" (26 U.S.C. 6601(f)).

Petitioners nonetheless seek to rely on statements in the legislative history of Section 1511 of the 1986 Act which, according to petitioners, reveal an intent of Congress to require global interest netting (Pet.

14-15, 22-23). Whether, as petitioners contend, the legislative history can be understood to reveal a preference for global netting is irrelevant—for the statute neither authorizes such netting nor imposes a requirement for it. As this Court has emphasized, "courts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point." *Shannon* v. *United States*, 114 S. Ct. 2419, 2426 (1994) (brackets in original), quoting *IBEW Local 474* v. *NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987). As the court of appeals correctly noted in this case, "Congress knows very well how to mandate something; it has not done so here" (Pet. App. 10).

Moreover, the legislative history on which petitioners rely does not support their position. That history does not reflect an intent to change the circumstances in which Section 6601(f) is to apply; instead, it explicitly confirms that Section 6601(f) applies only "to the extent a portion of tax due is satisfied by a credit of an overpayment." H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess., Pt. II, at 785 (1986) (quoted at Pet. 15). The committee report thus reflects a desire that the IRS implement comprehensive procedures that comply with existing statutes, rather than a desire (much less a directive) that the agency implement procedures that disregard those statutes.[2]

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[2] Petitioners also err in relying (Pet. 16-17) on subsequent committee reports (H.R. Conf. Rep. No. 964, 101st Cong., 2d. Sess. 1101 (1990); H.R. Rep. No. 826, 103d Cong., 2d Sess., Pt. I at 178 (1994)). Those reports referred to the agency's authority to credit overpayments against tax liabilities under Section 6402 and, again, explicitly recognized that, under applicable law, the netting rules of Section 6601(f) apply "[t]o the extent a portion of tax due is satisfied by a credit of an overpayment."

3. Petitioners contend that the decision of the court of appeals confers upon the IRS "unprecedented discretion to play interest arbitrage to the financial detriment of taxpayers" (Pet. 23). But the "discretion" of which petitioners complain is simply the discretion that Congress expressly provided the agency either to refund an overpayment or to credit it against an outstanding underpayment. 26 U.S.C. 6402(a). Other courts have consistently agreed that the statute has this precise purpose and effect. See *In re Ryan*, 64 F.3d 1516, 1523 (11th Cir. 1995); *Pettibone Corp.* v. *United States*, 34 F.3d 536, 538 (7th Cir. 1994); *Estate of Bender* v. *Commissioner*, 827 F.2d 884, 887 (3d Cir. 1987). Contrary to petitioners' assertion, it was thus Congress, in enacting Section 6402(a), not the decision in this case, that conferred that authority on the agency. Indeed, petitioners ultimately acknowledge that the statute itself grants discretion to the IRS to decide "whether an overpayment should be refunded to a delinquent taxpayer or applied against any delinquencies" (Pet. 28).

There is no basis for petitioners' contention that the decision in this case broadens the discretionary power that Congress expressly conferred on the agency by statute. Section 6402(a) authorizes the IRS, in its discretion, to credit overpayments against outstanding tax liabilities rather than refunding them. 26 U.S.C. 6402(a). The court correctly noted in this case that an overpayment may be "credited" *only* if an underpayment exists at the time the credit is to

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H.R. Conf. Rep. No. 964, *supra*, at 1101; H.R. Rep. No. 826, *supra*, Pt. I, at 178. Neither the committee reports nor the statutes they accompany purport to alter the application or scope of Section 6402(a) or 6601(f) of the Code.

be made (Pet. App. 7-8). See also 26 C.F.R. 301.6402-1. There was no occasion for the IRS to exercise its discretion to decide whether to credit or refund an overpayment under Section 6402(a) in this case because no "underpayments" existed at the time the overpayments were determined. The discretion that petitioners claim *could* be abused in some contexts was thus never even invoked on the facts of this case.

4. Petitioners err in contending (Pet. 26-29) that the decision in this case conflicts with the decision of the Seventh Circuit in *Pettibone Corp.* v. *United States*, 34 F.3d 536 (1994). The situation addressed in *Pettibone* is factually and legally distinct from the present case.

Pettibone involved a corporate taxpayer in bankruptcy that agreed to a Chapter 11 reorganization plan calling for full payment of its tax liabilities. 34 F.3d at 537-538. Following an audit, the IRS filed an amended proof of claim in the bankruptcy proceeding relating to 13 of the corporation's tax years. *Ibid.* Because the taxpayer had underpaid its taxes for some of the years in issue and overpaid for the others, the IRS credited the outstanding overpayments against the outstanding underpayments under Section 6402(a). The taxpayer claimed (i) that such crediting under Section 6402(a) constituted a "setoff" prohibited by the Bankruptcy Code and (ii) that interest continued to flow in its favor on the aggregate overpayments, but that the automatic bankruptcy stay precluded interest from running against it on the aggregate underpayments. 34 F.3d at 538. The court of appeals upheld the government's claim, however, concluding that "the netting of tax overpayments against underpayments" did not constitute a proscribed "setoff." *Id.* at 538-539.

The court of appeals correctly noted in this case (Pet. App. 13) that the government successfully asserted in *Pettibone* that overpayments could be credited under Section 6402(a) against tax liabilities of the taxpayer that *remained unpaid.* In the present case, by contrast, there were no outstanding underpayments of tax to credit against the overpayments at the time that the overpayments arose. The Seventh Circuit did not suggest in *Pettibone* that overpayments should—or could—be credited against former tax liabilities that had been fully paid, as petitioners contend should be required in this case. See 34 F.3d at 537. There is thus no conflict between *Pettibone* and the decision in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
BRUCE R. ELLISEN
CHARLES BRICKEN
Attorneys

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